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EVIDENCE CONSTITUTING PRIMA FACIE CASE THAT CHAUFFEUR WAS ACTING IN SCOPE OF EMPLOYMENT.

Just what evidence is necessary to constitute a prima facie case in an action for damages against the owner of an automobile for injuries arising out of the negligent operation of his machine by the driver, as to the driver acting at the time within the scope of his employment, is a question frequently arising and in many cases is the deciding issue. At the very beginning of any consideration of this question we are met with the fact that "inference" and "presumption," while not synonymous terms, are frequently used interchangeably. A presumption is a rule of law, whereas an inference is merely a permissible conclusion based upon facts which have been proved, or as to the existence of which there is evidence.

The rule is followed by some Courts that when evidence of ownership by the defendant of the vehicle in question has been introduced, a presumption arises that the vehicle was being operated in the business of the defendant. In many other jurisdictions the Courts hold that evidence of ownership of the vehicle by the defendant and that the driver was in his employ, raises a presumption that the vehicle was then being operated for the defendant. It is also held in some jurisdictions that a presumption of this kind vanishes when direct or positive testimony to the contrary has been given in behalf of the defendant, and that this has the effect of constituting a defense as matter of law to the plaintiff's case, unless he then introduces some further evidence to support the same. The rule under consideration is more properly stated in Guthrie v. Holmes, 272 Mo. 215, 233, which holds that this presumption vanishes "upon the appearance in evidence of the real facts." The mere testimony of the driver, for instance, that he was not engaged in any business of the owner at the time in question, but was following some pursuit of his own, is not necessarily such an appearance in evidence of the real facts as to destroy the plaintiff's prima facie case unless the fact of the driver act- a witness on the stand, or the fact that he contradicts himself in his testimony relative to this, or even some other fact testified to, renders the case one for the jury. In fact, the case should never be taken from the jury after the plaintiff has a prima facie case unless the fact of the driver act ing outside of his employment is established beyond dispute. If the so-called positive or direct testimony for the defendant is in any respect questionable, the case must be submitted to the jury.

Even in the application of the rule as to the failure of the plaintiff's case when direct evidence has been introduced by the defendant to show that the driver was not acting in his business at the time in question, slight circumstantial evidence on the part of the plaintiff is sufficient to support the presumption and take the case to the jury. In the case of Rockwell v. Standard Stamping Company, 241 S. W. 979, the St. Louis Court of Appeals lays down the rule that proof of ownership of a business truck bearing the name of the owner, is prima facie evidence that the truck at the time of an accident was being driven by a servant of the owner acting for the owner. Ownership of the truck was proved by testimony that the license number borne by it was issued to the defendant, and that the truck bearing this license number was found that evening in a garage belonging to the defendant. In its opinion the Court calls attention to the fact that the evidence established that this was a business truck,

and at the time was being operated during ordinary business hours of the day.

The distinction between "presumption" and "inference," as before alluded to, is well illustrated in this case. From evidence of the ownership of the truck there may arise the presumption that it was being operated in the defendant owner's business. That is a presumption. The further facts shown by the evidence that the truck in question was a business truck and that it was being operated during business hours, is circumstantial evidence from which an inference is properly drawn that the truck was being operated for the owner. Whenever circumstantial evidence is introduced by the plaintiff, for instance, of the kind just stated, no amount of so-called direct or positive testimony can keep the case from the jury, because these facts justify the jury in drawing an inference in favor of the plaintiff's case. In other words, evidence of the ownership of the truck by the defendant, that it was a business truck and that the accident happened during business hours is sufficient always to carry the case to the jury.

It is often difficult to distinguish between evidence which raises a presumption and circumstantial evidence from which an inference may be drawn. In the first instance the plaintiff's case depends upon failure of the defendant to introduce testimony to destroy the presumption. In the second, the plaintiff's case does not depend upon the failure of proof by the defendant, but stands upon its own feet and goes to the jury on the strength of the circumstantial evidence submitted by him.

Recently an attorney addressed the United States Supreme Court as follows: "If your Honors please, I move the admission of Mr. X., a member of the bar of Arkansas for more than three years. Mr. X. is of good moral character, and otherwise qualified for admission to practise in this court."

Chief Justice Taft: "The rules only require fair moral character."

The applicant, having exceeded the requirements of the court, was duly admitted to practise.

NOTES OF IMPORTANT DECISIONS.

POSSESSION OF RECENTLY STOLEN PROPERTY RAISES NO PRESUMPTION.—Holding that proof of possession by the accused of property recently stolen raises no presumption of law as to the guilt of accused, but is only a fact or circumstance from which guilt can be inferred as matter of fact, the Supreme Court of Missouri, in State v. Swarens, 241 S. W. 934, reversed a long line of cases extending over a period of more than forty years. Commencing with the case of State v. Kelly, 73 Mo. 608, which case had reached this court from the Court of Appeals, the Supreme Court had held that the possession of recently stolen property raised the presumption that the person in possession had stolen it. The opinion in the case was written by Judge Higbee and there were separate concurring opinions by Chief Justice James T. Blair, Judge David E. Blair and Judge Graves, and a dissenting opinion by Judge Walker. There has been so much confusion in the past arising from failure of courts to distinguish between facts which give rise to a presumption and facts which merely constitute circumstantial evidence that this decision will be thankfully received by the profession. We quote as follows from the opinion by Chief Justice Blair:

"The Kelly Case and all that have followed it, or the rule it announces, are wrong, and the courts should say so in no uncertain terms. That there is no such presumption as held in that case is made too clear by the authorities quoted and cited to require further discussion. The jury should be allowed to try the facts. The great number of erroneous decisions in this state, largely begot by State v. Kelly, is no reason for hesitation in adopting the correct rule. It is quite probable that in most cases no actual harm has resulted. It is obvious that in some cases injustice may be worked by the present rule. We should no longer direct trial judges to substitute themselves for the jury on important issues of fact in cases of this kind. That is what this court has been doing. The apology for the number of citations is that the error in question has become so thoroughly imbedded in our jurisprudence that the temptation to use all the fit material at hand in an effort to blast it out is too great to be resisted.

"An examination of the decisions cited in the preceding paragraph discloses that the practice with respect to the matter of instructing the jury concerning the effect of evidence of recent and exclusive possession of stolen property is not at all uniform. Issues of fact are to be tried by the jury. Section 4005, R. S. 1919. It is the trial court's province to determine whether there is substantial evidence tending to prove the charge (State v. Stevens, 242 Mo. loc. cit. 442, 147 S. W. 97), but it is the province of the jury to weigh the evidence and determine

whether it proves the charge beyond a reasonable doubt. State v. Cannon, 232 Mo. loc. cit. 215, 134 S. W. 513. It is the function of counsel to argue the case. While the trial court may set aside a verdict of conviction if he believes it to be opposed to the weight of the evidence, it is quite improper for him to give the trial jury, in any manner, his views of the weight of the evidence. He should not comment on the evidence, either in instructions or otherwise. If, under applicable rules, there is substantial evidence that property has been stolen, it is the business of the jury to say whether they believe this evidence and whether it engenders the requisite degree of belief in their minds. If there is substantial evidence of defendant's criminal agency, whether that evidence be evidence of recent and exclusive possession of stolen property or evidence of some other character, it is still the duty of the jury, and of the jury alone, to weigh the evidence, and for themselves to respond to the question whether this evidence convinces them beyond a reasonable doubt. The trial court ought not to argue the question, either directly or by comment in instructions, which, directly or by implication, gives the jury his view of the weight of the evidence. The evidence on such a question should go to the jury like that on any other."

REGULATION OR SUPPRESSION OF PRACTICE OF COMMUNICATING WITH DEPARTED SPIRITS THROUGH A MEDIUM HELD WITHIN THE POLICE POWER.—In McMasters v. State, 207 Pac. 566, the Criminal Court of Appeals of Oklahoma holds that the regulation or suppression of the art, practice, or profession of communicating with departed spirits by a person known as a "medium" while in a state of trance, who imparts such communications for hire, whether it be done pursuant to a system of philosophy, religion, legerdemain or metaphysical science, is within the police power of the state. We quote at some length from the opinion of the Court as follows:

"Even if the purposes of this organization are religious in their nature, it is difficult to see how the practice of giving "readings" or telling fortunes concerning the mating inclinations of men and women could be religious, in any sense. This medium, while in a trance and assuming to speak for Minnehaha, told Bessie Jones, whom she supposed to be a lovelorn girl, that she would soon meet an attractive blond boy, and that later a brunette would supplant him in her affections; that she would soon go on a long journey; that she would eventually marry a man of wealth, etc. All of which sounds very secular to this court. It seems very like a Gypsy fortune teller, or the reading of the palm by some wrinkled old hag, or the interpretations of a crystal gazer in a freak side show. Doubtless it was this species of hypocrisy and legerdemain that this statute was intended to suppress. An innocent practice or entertainment, whether of a religious nature or not, may be regulated or suppressed where the tendencies and temptations to pervert it into evil channels is manifest, and where the evil is likely to overbalance the good. Fantastic philosophers and religious zealots, like other people, must conform to wholesome police regulations. 6 R. C. L. Constitutional Law, § 237.

On the other hand, there have been and now are many persons of extraordinarily high mentality and intelligence who implicitly believe that communication can be had with departed spirits through a spiritualist medium. One of the most prominent adherents of this faith, A. Conan Doyle (who should not be confused with Thomas H. Doyle, presiding judge of this court) claims that departed souls are enveloped with a kind of external body, capable of being photographed, and that such photographs are in existence; also, that he has the physical writing of a letter written by a spirit friend. Maybe so—but, like Bessie, the stool pigeon, we are somewhat skeptical.

It is not for this court, however, to judge of the merits or demerits of philosophies, cults, or religions; we are expected to decide the law so far as it relates to the concrete facts shown in this record. The legendary Minnehaha never existed in the flesh; hence a continuity of her spirit cannot exist in the spirit world. Unlike Conan Doyle, this medium produced no photograph of the spirit of Minnehaha. Her identity was not established. Some unknown, playful spirit may have deceived the medium, or she may have intended to deceive her client Bessie. Hiawatha and Minnehaha were creatures of the imagination of the poet Longfellow. It is a pretty, fascinating love poem, with a natural appeal to girls who long for romance in love. For example:

> As unto the bow the cord is,
> So unto the man is woman.
> Though she bends him, she obeys him,
> Though she draws him, yet she follows—
> Useless each without the other.
> Thus the youthful Hiawatha,
> Said within himself and pondered,
> Much perplexed by various feelings;
> Listless, longing, hoping, fearing,
> Dreaming still of Minnehaha,
> Of the lovely Laughing Water
> In the land of the Dakotas.

"If sure of her identity, it would be well worth a dollar of any girl's money to have the benefit of the advice of the sparkling, romantic spirit of Minnehaha.

"But the unrestrained practice of this art, or whatever it may be, is susceptible of abuse within the power of the Legislature to suppress. Its mandates, within constitutional limitations, bind this court. Appeals to the spirit world might avail before the case reaches us, but here we have no jurisdiction over any spirits except those banned by the prohibitory law, such as "Bourbon," "Mountain Dew," "Forked Lightning," and like distillates—like those in the spirit world, some good and some bad.

"The only practical appeal remaining is an appeal to the Governor for executive clemency. Since no one was injured, we feel that execu-

tive clemency would be proper, at least to the extent of setting aside the jail sentence. The sentence imposed was the minimum provided by law, so that this court, on affirmance, is powerless to modify it. This case, on the law and the facts, should be affirmed; and it is so ordered."

RECENT DECISIONS IN THE BRITISH COURTS

An interesting point of bankruptcy practice came before Mr. Justice Astbury, and eventually the Court of Appeal, in Re Keene, 38 T. L. R. 663, C. A. Here a bankrupt had refused to disclose to his trustee in bankruptcy the secret unwritten formulae for articles which he had manufactured in his business. He contended that such formulae were a part of his personal skill or knowledge, and that this was not part of the property which under the Bankruptcy Acts is transferred to his creditors; there were other objections to the disclosure, but this was the only one raising a question of principle in bankruptcy practice. The trustee, in fact, wanted the formulae, because with their possession he could sell the business, without them he could not obtain an offer for the assets as a going concern. The Court of Appeal decided the matter on a very simple ground. Suppose the formulae, although secret, had been reduced to writing, it is well settled that such a document is part of the property divisible among the creditors. To write down the formulae involves no personal skill; it is precisely analogous to the signature of documents necessary to assign property. Therefore the Bankrupt can be ordered by the Court to write down the secret formulae in order that a written document containing them can be included among his business assets.

Scranton's Trustee v. Pearse,[1] was an action brought by the trustee of a bankrupt under the Gaming Act, 1835, to recover moneys paid by cheques to the defendant in respect of betting transactions. After the decision of the House of Lords in Sutter v. Briggs,[2] that would be an undefended action. But it was argued that, although there could be no defense to the action, yet because the case fell within the doctrine laid down in Ex parte James[3] the trustee being an officer of the Court ought not to be allowed to sue, as it would be a dishonourable thing for an ordinary private individual to do; it was variously expressed as being a shabby or a dirty trick or a thing to be ashamed of. He (his lordship) was by no means convinced that the matter would be solved by saying that if an individual could not honestly do a certain thing, therefore a trustee for creditors could not do it either. An individual acted in his own interests, but a trustee in bankruptcy was bound to administer the bankrupt's estate for the benefit of the creditors in general. There was a great difference between the present case and any other case in which the doctrine of Ex parte James (supra) was said to apply. There was an unquestioned right in the trustee to recover this money; it was a chose in action vested in him. He was realizing what was a statutory debt. The statute said that the money so paid "shall be deemed to have been originally given upon illegal consideration, and shall be deemed to be a debt due and owing from such last named person * * * and shall accordingly be recoverable by action at law in any of His Majesty's Courts of Record." Looking at Ex parte James (supra) it would be seen that the circumstances were very different. The trustee had there got money in his hands which was not his money, and should never have been received by him. In that case the trustee was not allowed by the Court to keep the money. Another class of case was where there was an asset which had been kept alive by payments of premiums made by a person to the knowledge of the trustee, in the belief that he (that person) would get the benefit of the policy. That, again, was a totally different case. In two

(1) 66 S. J. 503.

(2) 1922 A. C. 1.

(3) L. R. 9 Ch. 609.

cases where payments were made which increased the estate without the knowledge of the trustee the trustee was held entitled to retain the money. The case of in re Thellusson[4] was perhaps an extension of the doctrine, but if it was, it was an extension which fell far short of the contention of the respondent in the present case. There something had been done by the bankrupt, something of which he was entitled, but not obliged to take advantage, and the Court said that he should not, as it would be dishonourable of him to do so. The Court in that case probably did extend the doctrine of Ex parte James a stage further. But if what Astbury, J., had done in the present case was right, it amounted to a repeal of the Gaming Act, 1835, in the event of the claim to recover moneys paid for bets being made by a trustee in bankruptcy or other officer of the Court. That would at least be putting into the statute a clause which was not there, or repealing it to some extent. The learned judge thought that he could apply the doctrine, because in his opinion the statute was not to be regarded as part of the public policy of the realm. It was a very dangerous doctrine to attempt to test legislation by what was or should be regarded as public policy. The duty of the Court, when it had ascertained the meaning of an Act of Parliament, was to see that it was carried into effect. For those reasons, he was of opinion that the doctrine invoked did not apply in the present case at all. The Court was bound by decisions but not by dicta. He (his lordship) saw nothing in any of the cases which entitled the Court to say that if and when a right of action to recover money paid in respect of bets vested in a trustee in bankruptcy, it was a shabby and dishonourable thing for him to enforce it. For those reasons he thought that the appeal must be allowed and judgment given for the amount claimed.

A very important question in banking and bankruptcy law was raised by the liquidator in Re Farrows Bank Ltd.[5] He asked the Court for a direction whether a customer of the Bank, and the payee of a cheque for £1493:15:2d. which he had paid into his account at a country branch of the bank, was entitled to be paid in full by the liquidator, or should only receive a dividend as a creditor. Did the bank, at the date of the winding up, hold the cheque as agents for collection or holders for value? The cheque was drawn on the West Bromwich branch of the London Joint City and Midland Bank in favour of one Voyce, and was paid by him to his account at the Birmingham Branch of Farrow's Bank on the 16th of December, 1920. It was sent to Barclay's Bank in London, the clearing agents for Farrow's Bank, and was by them sent to the Clearing House on Friday, the 17th of December. On the 18th of December the West Bromwich branch of the London Joint City and Midland Bank debited the cheque against the drawer's account. December 18th was a Saturday, and on Monday (20th) at 8:30 A. M. Farrow's Bank suspended payment. At 12:30 P. M. the head office of the London Joint City and Midland Bank settled payment of the cheque with Barclay's Bank, who at once credited Farrow's Bank with the amount. At 2:30 P. M. on the same day Farrow's Bank presented their petition for winding up. Voyce, on the 17th and 18th of December, had drawn against the sum which had been credited to him on the cheque. There was no arrangement between himself and the bank by which he could draw against cheques which had not been cleared, and his pass-book stated that "proceeds of remittances are only available after receipt by the bank." The paying-in slip also said that the bank might refuse to honour cheques drawn against cheques paid in till the latter were cleared.

It was argued on behalf of the liquidator that the cheque having been credited to

(4) 1919, 2 K. B. 735.

(5) The Times, July, 20th 1922.

Voyce and drawn against the bank were holders for value; the relation between the bank and Voyce was that of debtor and creditor, and Voyce was only entitled to a dividend; also that as collectors they were entitled to act till the presentation of the petition. On the other side it was argued that the bank held only as agents for collection till the third day after payment, and on that day they suspended payment. Mr. Justice Astbury held that on the facts, as shown by the statements in the pass-book and on the paying-in slip, the bank received the cheque not as holders for value but as agents for collection; and that since they had not, in fact, received the money for the cheque till after they had stopped payment and ceased to act as a going concern, they had no longer authority from Voyce to take his money and convert it into the money of the bank, and thus establish the relation of debtor and creditor. Voyce was therefore entitled to be paid the amount of the cheque in full.

The general rule is that action must be taken in the Courts of the jurisdiction in which the defendant is resident. An exception to this is permitted by one of the Rules of Court which provides that service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever the action is one brought against a defendant to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of a breach of contract made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction.

A plaintiff's claim was for damages for breach of warranty on the sale of Belgian barb wire fencing. The defendants were a Belgian firm, and did not carry on business within the jurisdiction. They had an agent in London, who supplied lists of prices, but had no authority to make contracts. He received orders and transmitted them to the defendants who accepted the orders by posting them from Belgium to the plaintiffs. It was argued for the defendants that the contract was not made by or through the agent, but direct with the foreign principals. It was also argued that the plaintiffs had not in their affidavit made such a full disclosure of facts as was essential for the Judge in making the order, since they had not said that the acceptances were not made through the English Agent. The Court held that a contract was made "through" an agent within the meaning of the rule when the terms were arranged through the mediation of an agent, as in the present case, even though the agent did not profess to bind the principal. It was also held that the affidavit should not be treated as incomplete, since in it all relevant documents were referred to.

English arbitration law provides for the submission by the arbitrator by way of special case to a Court of law any point of law on which legal direction is required. In *Czarnikow v. Roth Schmidt & Co.* a contract was entered into subject to the Rules of the Refined Sugar Association; Rule 17 provided for the settlement of all disputes by arbitration. Rule 19 made the obtaining of an award a condition precedent to the right to sue; and, further, proceeded to say that neither party should require, or should apply to the Court to require, any arbitrators to state a special case on a point of law, but that questions of law should be determined by arbitration. The arbitrators in this case refused either to state their award in the form of a special case or to state a case for the opinion of the Court or to delay the issue of their award till application could be made to the Court to direct them to state a case. It was held that though the making of arbitration a condition precedent to the right to sue did not amount to an ouster of the jurisdiction of the Court[6] yet that the provision forbid-

(6) Scott v. Avery 5, H. L. Cases 811.

ding leave to apply to the Court to order arbitrators to state a case on a point of law was contrary to public policy, as tending to allow commercial tribunals to administer laws of their own making.

DONALD MACKAY.

190 West George Street, Glasgow, Scotland,
August, 1922.

IDENTIFICATION BY TYPEWRITING.

By MILTON CARLSON*
of Los Angeles, Cal.

When the typewriter first made its appearance as a means of communication, the crook presumed that he could hide his nefarious acts by the use of the machine in writing black-hand letters, spurious communications, forgeries, etc., but frequently the layman have been disillusioned through the science of the Examiner of Questioned Documents, who has proven on numerous occasions that the typing from a machine has as many characteristics and is as definite in its identifications as are the characteristics found in the handwriting of an individual or any other means of identification.

However, many take the chance and typewrite black-hand letters and letters of extortion.

A most interesting case of black-hand letters by the use of a typewriter was recently tried in a Federal Court. The case of the United States versus Randow and Sergo. W. J. Braun, a prominent citizen of Los Angeles, California, received through the United States mail a typewritten envelope containing a typewritten letter, threatening the life of himself and family if $20,000.00 was not placed, at a certain time of night, behind a billboard at one of the corners of a cross street.

The recipient of the letter paid little attention to the missive; the designated time passed and forthwith another typewritten letter, in stronger and more emphatic terms, called attention to his negligence and named a shorter length of time in which to place the required $20,000.00 at the place designated, adding that his home would be burned and his life sacrificed if demands were not complied with. This letter rather "shot" the recipient. He called officers into consultation.

Upon consultation it was determined that the recipient of these letters should make a "dummy" of appropriate size, of newspaper scraps to resemble a package of $20,000.00 in bills, as was demanded in the letters, and place same at the spot designated. This was done and officers secreted themselves in the vicinity to watch and capture any who might come to recover the package thus "planted." The evening happened to be rather dark and drizzly. The location from point of observation of the officers was unfortunately somewhat distant from the location of the package.

After a few hours of waiting there appeared three persons in the vicinity, not sufficiently close, on account of the darkness of the night and unsettled weather, for the officers to identify them. They separated. One of them darted back of the billboard, grabbed the package, slipped it in his pocket and vanished in the darkness of the mist before the officers could recognize or capture him.

One can imagine the chagrin experienced by these black-handers when they opened the coveted package merely to find waste paper. Undoubtedly they became incensed. Forthwith a third typewritten epistle was received by Mr. Braun, in bright red typing. In imperative language appeared the words: "You don't need to fool us, we mean business. We give you this one chance, which is your last, or *death*. Since you choose to fool us we demand that $25,000.00 be put at the same place on the third day from today at 8:30 o'clock P. M. This must be *money* or death is yours." Follow-

*Mr. Milton Carlson is Examiner and Photographer of Questioned Documents.

ing receipt of this epistle another "plant" was made (with a few one dollar bills stuck on the outside edges of a package of waste paper clippings), in the designated place at the appointed hour. The officers again secreted themselves, surrounding the spot. They had not long to wait. Three figures again appeared in the vicinity of the billboard and as casual pedestrians walked up and down the street in various directions and as they passed the entrance to the back of the billboard one darted behind the screen, grabbed the package and ran. As he did so an officer shouted "Halt, in the name of the law or I'll shoot!" The culprit continued to lengthen the distance between himself and the law. The officer fired. The culprit ran faster. Another officer passed swiftly into the darkness after him.

The other two pedestrians had quickly separated and entered a brick house in the vicinity, one through the front door and the other through the rear entrance. The officers raided the building and rounded up the inhabitants — some twenty persons, Italians, Slavs, and a general conglomeration of foreigners.

The building was placed under guard while other officers carefuly searched the house, taking one Randow from a room, a filthy and unkept place in which he admittedly lived. He also admitted that the things contained therein were his. The officer found, underneath an old mattress in one corner of the room, an ancient typewriter, a Fay-Sho machine. This, upon interrogation, Randow admitted was his. The officers appropriated same and after due interrogation of the inhabitants, the typewriter and the inmates of the house were taken into the custody of the law. Later, all were dismissed except Randow and one Sergo—but two of the three who had promenaded the street.

At Police Headquarters an officer proceeded to take samples of the typing of the machine. To his surprise, as he lifted the roll to observe the characters, there was but little there, for the ribbon of the machine had become disconnected and fallen out of place. The ribbon was readjusted and the sample of the typing of the machine was taken. The officers felt rather confident, upon comparison of the blackhand letters with the samples, that they were written upon the machine in evidence. But as the ribbon attached to the machine was all of a solid black, the query naturally arose, "How could the red letter have been written upon the same machine when there was no red ribbon in evidence either on the machine or in the house that was searched. It was at this juncture that the handwriting expert, Milton Carlson, of Los Angeles, was called into consultation.

The first, second and third black-hand letters (the third being in red type) were handed to him with the request that he make investigation of the machine and samples taken therefrom and ascertain if they were or were not the product of the same machine. The puzzling question was suggested—"How could the red letter be typed upon the machine when there was no red ribbon in evidence?"

Mr. Carlson examined the paper upon which the officer had first attempted to take samples. His keen eyes immediately caught the solution to the question. "Why, this is simple," he exclaimed. Handing the officer the red letter which he had not yet examined, he said "I can name letters of the alphabet and characters that appear in that red letter, and letters of the alphabet and characters which do not appear in that red letter. This will be a good test of my ability to make a correct deduction."

The officer held the blackhand letter typed in red, and Mr. Carlson called attention to "e," "d," "t," "a," "f," etc., letters found in the red document. Then he named letters such as "j," "k," "q," "x," "z," etc., which were not found in the red document.

The officers was amazed. "Why, that is

correct," he said, "but how can you tell without examining the document?"

"That is a simple matter of deduction," replied Mr. Carlson. "When you attempted the first time to make a sample of the typing of this machine, the ribbon was disconnected and the type came in direct contact with the paper on the roll of the machine. The type, coming in direct contact with the paper, leaves the imprint of the form or letter, and each form or letter is inked with either red or black, and sometimes both red and black particles are found therein. The characters on this sample which I hold and which contain both red and black letters, must be the characters used in writing the red document which you hold. The letters upon this sample are entirely black, must of necessity not be found in the red letter which you have in your hand."

The officer said, "That is true, but does that prove that this red letter was in truth the last letter typed on this machine?" To which Mr. Carlson replied, "It does for this reason. It will be observed that the letters and characters most frequently found in the red letter contain the most red on that first sample you took, while the letters found less frequently in the red letter have more black and only a few particles of red, and you will observe that the letters of the alphabet and characters which do not appear *at all* on the red letter, do not contain one particle of red, but are entirely black. And so by an analysis of the proportionate amount of red and black or the absence of black on the sample, the only correct deduction is that a red letter was last typed on this machine."

To prove this analysis, the black ribbon was removed from the machine and a sample was taken. The first sample taken had been mostly red. This sample contained only the slightest particles of red, for the red ink in the type had been wiped off on the black ribbon while the samples were being taken from the machine.

The trial lasted several days. The deductions drawn from the samples of the typing were so conclusively proven to be correct and the identification of the individuals so complete that the jury was out but a few minutes, all returning a verdict of "guilty."

Thus, the typewriter was the conclusive proof necessary to identify the blackhanders.

DOES ART AND RECREATION CONTRIBUTE "BENEFICIAL USES" OF PUBLIC WATERS?

Let them who say that law is a dry as dust subject read the following eloquent discussion of what is a "beneficial use" of water in this country. It occurs in an opinion of United States District Judge Lewis of Colorado, 181 Fed. 1011, and treats of the application of water to make a summer resort of Cascade, near Colorado Springs. A lawyer (or any one else) who reads such language, would want to go as soon as possible to see what the Judge is talking about:

"LEWIS, District Judge. Complainant, the Cascade Town Company, owns several hundred acres of land up Ute Pass, about eleven miles from Colorado Springs. Fountain Creek flows through Ute Pass in an easterly direction, and as it passes the lands of the complainant company its waters are augmented by those of Cascade Creek—short in length of flow but precipitous—which comes down from the watershed on the northerly slope of Pike's Peak to the westerly. The said complainant company and its predecessors in title have owned these lands for many years, and they began improving them as a summer resort more than twenty years ago, and have maintained them as such ever since and have not sought to utilize them otherwise. For that purpose they have constructed hotels there and built cottages, roads and trails on its lands extending up through Cascade Canon, through which the stream of the same name flows, and on beyond into the mountains, laid out, dedicated to the public and improved a small park in said canon, made a lake and fountain, built a pavilion or auditorium for conventions, and otherwise improved its grounds, thereby adding to the attractions

of the place as left by nature. The complainant company and its predecessors are not, and were not, municipal corporations, but business ventures created for the purpose of maintaining their property as a resort for tourists during the summer season. The place is known as Cascade. The Midland Railway, which traverses Ute Pass, has a station there. The complainant company has sold some of its property to persons who desired to improve the same as summer homes, and the complainant Bigger has spent about $15,000 in improving his home on land bought from the company, lying on both sides of Cascade Creek just below the canon. The company obtains an income from those who stop at its hotels and enjoy other accommodations which it offers. It has spent a large amount of money in improvements. The roads and trails up Cascade Canon and on into the mountains were constructed at an expense of fifteen or twenty thousand dollars. It also built a small waterworks to supply the cottages and its hotels. It advertises the place for the purpose of inducing the public to go there, and for the past quarter of a century it has been visited annually by twelve or fifteen thousand people. It has a permanent population of fifty or sixty people. Among other attractions held out in its advertisements are Cascade Canon and the falls of Cascade Creek through the canon. The canon and falls are rare in beauty and constitute the chief attraction. Without them the place would not be much unlike any other part of Ute Pass. The canon is about three-quarters of a mile long and very deep; its floor and sides are covered with an exceptionally luxuriant growth of trees, shrubbery and flowers. This exceptional vegetation is produced by the flow of Cascade Creek through the canon and the mist and spray from its falls. Some of these falls are as much as thirty feet in height, but the difference in elevation between the foot and the head of the canon is so great that the falls are almost continuous from the head down. The volume of water is the greatest during the summer season. It comes from the melting snows on the north slope of Pike's Peak. But the flow is fairly even, due to the fact that the upper stretches of the watershed are composed of disintegrated granite into which the water first sinks and gradually percolates until gathered into the bed of the stream. The volume is said to be equivalent to a stream about eight feet wide and six to eight inches in depth. The vegetation in the canon and up its sides consists, in part, of pine, spruce, fir, balsam, aspen, black birch, Japanese maple, thimble berry, wild cherry, choke cherry and aster, columbine, larkspur, wild rose, the red raspberry, wild gooseberry, ferns, mosses, and many other kinds of trees, shrubs and flowers. The stream is annually stocked with trout. The birds which are found in the canon, some grouse, a few squirrels, and perhaps a few other wild animals there, are protected by the complainant company. The complainant called a florist of twenty-five years' experience and a landscape gardener of thirty-five years' experience as witnesses. They tell us that the native flora of the country is quite extensive in Cascade Canon, that the evergreen features are perfect, that there are three or four varieties of pines, three of juniper and three of spruce, probably twenty-five varieties of native shrubs, about fifty varieties of native perennials, and several varieties of moss growth, and a large variety of wild flowers and flowering shrubs, that the waterfalls create a spray and mist which, together with the underground seepage down the sides of the canon, produce this very luxuriant growth, there being at least two hundred varieties of vegetation, and that it is far superior in that respect to any other canon in the neighborhood, and exceptional. The seepage and the mist and spray give life to the foliage.

"The courts have not defined, because they as yet are unable to define, the exact boundaries of the territory known as 'beneficial use.' Mr. Kinney, in his work on Irrigation, says:

" 'The purpose contemplated for the use of the water may be irrigation for agricultural or horticultural purposes, mining, milling, manufacturing, domestic or any other purpose for which water is needed to supply the natural and artificial wants of man provided it be for a beneficial use.' (Section 150.)

" 'The public health is a beneficial use, and for that purpose, among others, a city may condemn streams of water. The water, when so obtained, may be used and is used in any manner that will promote the public health; it is used for sprinkling the streets, washing the pavements and flushing the sewers. Rest and recreation is a beneficial use, and for that purpose water is used to make beautiful lawns, shady ave-

nues, attractive homes, and public parks with fountains, lakelets and streams, and artificial scenic beauty.

"'The creation of a summer resort is a beneficial use. Is it no benefit to the public to spend money in making a beautiful place in nature visible and enjoyable? Is it not in line with public health, rest and recreation? If a person takes a stream and, after putting in water-falls, ponds, bridges, walls, shrubbery and blue-grass sod, works it into a beautiful home, that is a beneficial use. It is a benefit to the weary, ailing and feeble that they can have the wild beauties of nature placed at their convenient disposal. Is a piece of canvas valuable only for a tent-fly but worthless as a painting? Is a block of stone beneficially used when put into the walls of a dam, and not beneficially used when carved into a piece of statuary? Is the test dollars, or has beauty of scenery, rest, recreation, health, enjoyment something to do with it? Is there no beneficial use except that which is purely commercial?

"'It would seem that parks and playgrounds and blue grass are benefits and their uses beneficial, although there is no profit derived from them; if not, then the contention of the defendant corporation must be maintained that nothing but money-making schemes are beneficial. The world delights in scenic beauty, but must scenic beauty disappear because it has no appraised cash value? If this defendant corporation takes the water out of Cascade Canon, it can take the water out of the Seven Falls and Cheyenne Canon, and Glen Eyrie, and the beautiful parks, and homes and summer resorts of the state. We feel compelled to say that there are other beneficial uses of the fall of water than the mere production of commodities in competition with others now existing. When the defendant company says the complainants are putting the fall of the water to no beneficial use, it means that the complainants are not ruining the beautiful scenery for cash.'

"It is therefore held that the maintenance of the vegetation in Cascade Canon, for the purposes to which it has been devoted by the complainant, by the flow and seepage, and mist and spray of the stream and its falls as it passes through the canon, is a beneficial use."

H. L. BICKLEY.

Raton, N. M.

COVENANTS—SALE RESTRICTION.

PARMALEE v. MORRIS.

188 N. W. 330.

Supreme Court of Michigan, June 5, 1922.

A restriction in a deed that no lot in an addition to a city should be occupied by a colored person is not void as contrary to public policy, nor as contravening rights granted by Const. U. S. Amends. 13, 14.

W. Hayes McKinney, of Detroit (Barnes & Stowers, of Detroit, of counsel), for appellant.

Doty & Cram, of Pontiac, for appellees.

MOORE, J. The chancellor who heard this case filed a written opinion therein which so clearly states the questions involved that we reproduce it here:

"At the time the Ferry Farm addition to the city of Pontiac was platted, the lots were sold subject to the following uniform restrictions:

"'No building shall be built within twenty feet of the front line of the lot. Said lot shall not be occupied by a colored person, nor for the purpose of doing a liquor business thereon.'

"Defendant Morris, and Anna Morris, his wife, both colored, have entered into a contract to purchase a lot in the subdivision, and the bill of complaint was filed by plaintiffs, who are owners of lots on the same subdivision and residents of the neighborhood, to restrain defendants from violating the restriction by occupying the premises in question. The record presents the sole question as to whether or not the restriction against the occupancy of the premises by a colored person is void as contravening the provisions of the Thirteenth and Fourteenth Amendments to the Constitution of the United States, while plaintiffs insist that the provisions of the federal Constitution have no application and that the restriction is a matter of a purely personal action of the owner of the premises and is valid and enforceable.

"Every owner of land in fee is invested with full right, power, and authority, when he conveys a portion away, to impose such restrictions and limitations on its use as will in his judgment prevent the grantee, or those claiming under him, from making such use of the premises conveyed as will impair the use or diminish the value of the part which he retains. The only limitation on this right is the requirements that the restrictions be reasonable; not contrary to public policy and not create an unlawful restraint on alienation. These rights have been repeatedly recognized by our Supreme Court, and in a recent case the following quotation from 7 R. C. L. 1, 114, is cited with approval:

"'A person owning a body of land, and selling a portion thereof may, for the benefit of his remaining land impose upon the land granted any restrictions not against public policy, that he sees fit, and a court of equity will gen-

erally enforce them.' Davison v. Taylor, 190 Mich. 605, 611 (162 N. W. 1033).

"The reasons urged on behalf of defendants, why these general rules are not decisive of the issue, are:

"(1) Because the restriction contravenes rights granted to defendants by the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

"(2) Because the restriction is contrary to public policy.

"These reasons will be discussed in their order.

"1. Since the days of the civil rights cases, the law has been regarded as settled that the provisions of the Thirteenth and Fourteenth Amendments applied to legislative acts of the state rather than the actions of individuals. In the civil rights case, 109 U. S. 3 (3 Sup. Ct. 18, 27 L. Ed. 835), the United States Supreme Court, in passing upon the scope of these amendments, said:

" 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment; it has a deeper and broader scope.'

"And again in U. S. v. Cruikshank, 92 U. S. 542 (23 L. Ed. 588), it is said:

" 'The inhibition of the Fourteenth Amendment applies exclusively to actions by the state, and has no reference to actions by individuals.'

"In an exhaustive opinion in Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1, 138, 41 L. Ed. 256, the court said:

" 'The object of the amendment (Fourteenth) was to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish the distinction based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting and even requiring their separation in places where they are liable to be brought in contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally recognized as within the competency of state legislatures in the exercise of their police powers.'

"It is interesting to note that in the foregoing case the Supreme Court of the United States sustained the validity of a statute of Louisiana providing for the separation of races in passenger cars as not being repugnant to the provisions of the Fourteenth Amendment.

"It would seem settled by the foregoing decisions of the highest court of our land that the provisions of the Thirteenth and Fourteenth amendments cannot be invoked in the present case. The issue presented arises out of individual rather than state action and is to be determined wholly as a domestic issue. The case of Gandolfo v. Hartman, 49 Fed. 181; 16 L. R. A. 277, cited by defendants, has but little bearing on the issues presented. In that case a covenant not to rent property to a Chinaman was held to be void and unenforceable. The effect of the Fourteenth Amendment was discussed by the court, but the case appears also to have turned upon the provisions of the treaty with China which guaranteed its citizens the equal protection of our laws.

"2. Is the restriction contrary to public policy?

"It has been said that certain acts are contrary to public policy so that the law will refuse to recognize them when they have a mischievous tendency so as to be injurious to the interests of the state. This brings up the question as to what interests of the state are likely to be injured if an owner of property, for reasons which are satisfactory to himself, refuses to sell himself, or permit his assignors to sell, to certain persons who may be distasteful to him as neighbors. Are there any interests of the state which will be promoted or advanced compelling the creation of such a condition in the community? The law is powerless to eradicate racial instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matter of purely private concern. For the law to attempt to abolish these distinctions in the private dealings between individuals would only serve to accentuate the difficulties which the situation presents.

"The precise issues presented have been squarely before the courts of last resort of several states, and have been decided adversely to the contentions of defendants.

"In Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596, 9 A. L. R. 115, the court distinguished between a restriction against the sale and one against the occupancy of certain property by persons other than of the Caucasian race. The former was held invalid, as an unlawful restraint on alienation, while the latter was upheld.

"In Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217, 9 A. L. R. 107, the Supreme Court of Missouri held that a condition in a deed against the transfer, lease or renting of the property in question to negroes was one which the vendor had a right to make and was not void on the ground of public policy. The same court, in Keltner v. Harris, 196 S. W. 1, also held that where an owner of real estate made a contract of sale of the same to a white man, and after making the deed discovered that it was made to a colored man for whom the white man was merely an agent, that the conveyance would be voided on the ground of fraud, saying:

" 'If it was distasteful to plaintiff to have a colored man as his adjoining neighbor, he had a legal right to refuse to sell to him or his agents the property in question. In other words, no man is bound to sell his property to a proposed purchaser whose presence is unsatisfactory to him as a neighbor, whether he be white, black or any other color.'

"The same question was also before the Supreme Court of Louisiana in Queensborough Land Company v. Cazeaux, 136 La. 724, 67 So. 641 (L. R. A. 1916B, 1201) Ann. Cas. 1916D, 1248, where it was held that a condition in a deed that the grantee should not sell to a negro did not violate the provisions of the Fourteenth Amendment and was not against public policy.

"One of the purposes of the restriction in the instant case was apparently to preserve the

subdivision as a district unoccupied by negroes. Whether this action on the part of the owner was taken to make the neighborhood more desirable in his estimation or to promote the better welfare of himself and his grantees is a consideration which I do not believe enters into a decision of the case. So far as I am able to discover, there is no policy of the state which this action contravenes. Were defendants' claim of rights based upon any action taken by the authority of the state, an entirely different question would be presented.

"Defendant's motion to dismiss the bill of complaint will therefore be denied. The injunction heretofore issued is, however, broader than warranted by the provisions of the restriction. The restriction covers the occupancy of the property by a colored person only. In terms at least it would not be violated by leasing the same to a colored person so long as such person did not occupy it. The temporary injunction heretofore issued will therefore be modified to the extent of prohibiting defendant from occupying the premises himself, or from permitting the same to be occupied by a colored person, and, as so modified, will be made permanent. Glenn C. Gillespie, Circuit Judge."

A decree was made in accordance with the opinion. The case is brought here for review by appeal.

Counsel urge the same defenses that were urged in the court below. The following cases are cited by counsel for the appellant: Title Guaranty & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470; Buchanan v. Warley, 245 U. S. 74, 38 Sup. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201; Ferguson v. Gies, 82 Mich 358, 46 N. W. 718, 9 L. R. A. 589, 21 Am. St. Rep. 576; Gandolfo v. Hartman, 49 Fed. 181, 16 L. R. A. 277; Windemere-Grand Imp. & Protective Ass'n v. American State Bank of Highland Park, 205 Mich. 539, 172 N. W. 29; 18 Corpus Juris, pp. 397-399; and other authorities. Some of these authorities do not sustain the contention of counsel.

We quote 18 Corpus Juris, 397, as follows:

"While restrictions against the use of property held in fee are not favored, yet where the intention of the parties is clearly manifested in the creation of the restrictions, they will be enforced in equity. Any use in contravention of the terms and objects of such covenants will constitute a breach for which relief may be obtained. Covenants restraining the use of real property afford an instance of that class of cases in which equity will charge the conscience of a grantee of land with an agreement relating to the land, although the agreement neither creates an easement nor runs with the land. The jurisdiction is not confined to cases in which an action at law can be maintained, but such covenants, although not binding at law, may be enforced in equity provided the grantee has taken with notice of the covenants"—citing many cases in the notes.

In Windemere-Grand Improvement Association v. American State Bank, supra, it was held the restrictions would not be enforced in equity where the character of the locality had changed.

In Ferguson v. Gies, supra, this court gave effect to the plain provision of a statute.

A reference to the other cases will show them ea ily distinguishable from the instant case.

Counsel say in the brief:

"Under the theory of our American democracy and citizenship, negroes, or any other race or class, ought not now be forced to stand and plead for right, justice and equity which ought to be the common heritage of all men by virtue of their citizenship and domicile within the jurisdiction of the United States. If the opinion of the learned trial judge is affirmed, it will open a wedge to all kinds of discrimination, wrongs and injustice to a vast number of American citizens of African descent. Slavery was once defended by church and statesmen, but who today would want to be classified as an upholder of such a vile institution?

"Such a restriction as the one referred to, if upheld, would place the negro and people of other sects and creeds in the same category as slaughter houses, livery stables, tanneries, garages, etc., and brand them as a nuisance, loathsome and undesirable in neighborhoods. * * *

"Would the learned trial judge's decision stand the test of time? Will there always exist in this country conditions whereby judicial decision will band 10,000,000 of people, as it affects the negro, 3,000,000 as it affects the Jew, and about 30,000,000 as it affects the foreigner, and equally as many as it affects the Catholic, thus placing all of these classes in the list of undesirables? * * *

"We think the learned trial judge's decision in this case, if affirmed, would in a short period of time take the course of the Dred Scott Decision written by Mr. Justice Taney."

We think the counsel has entirely misapprehended the issue involved. Suppose the situation was reversed, and some negro who had a tract of land platted it and stated in the recorded plat that no lot should be occupied by a Caucasian, and that the deeds that were afterwards executed contained a like restriction; would any one think that dire results to the white race would follow an enforcement of the restrictions? In the instant case the plat of land containing the restriction was of record. It was also a part of defendant's deed. He knew or should have known all about it. He did not have to buy the land, and he should not have bought it unless willing to observe the restrictions it contained.

The issue involved in the instant case is a simple one, i. e., shall the law applicable to restrictions as to occupancy contained in deeds to real estate be enforced, or shall one be ab-

solved from the provisions of the law simply because he is a negro? The question involved is purely a legal one, and we think it was rightly solved by the chancellor under the decisions found in his opinion.

The decree is affirmed, with costs to the appellees.

NOTE—Restrictive Covenant Against Sale of Land to Negro Not Unconstitutional.—As the cases on this subject are well collected and quite comprehensively considered in the opinion of the reported case, it is thought unnecessary to attempt any further annotation.

ITEMS OF PROFESSIONAL INTEREST

QUESTIONS ON PROFESSIONAL ETHICS AND REPLIES BY THE CHICAGO BAR ASSOCIATION.

QUESTION 3.

Is there any professional impropriety in a lawyer representing an organization by writing legal opinions for their customers upon a salary or on a commission basis? This organization will be known as a service bureau, rendering service in the nature of investigations, collections, statistics and legal opinions for bankers and manufacturers under a yearly contract for services rendered.

ANSWER.

It may be that the acts of the "organization" fall within the condemnation of the statute prohibiting corporations from practicing law. (Session Laws, 1917.) The Committee expresses no opinion upon this question of law. If the act of the organization is unlawful, the lawyer should not participate therein or in any emoluments received therefrom.

Even if the suggested arrangement is not illegal, as permitting the organization to practice law, it, in the opinion of the Committee, should still be disapproved. The relation between attorney and client is of a personal and fiduciary nature imposing obligations and responsibilities which can only be fully realized when they deal with each other directly and the offer of a third party, not an attorney, to furnish or sell the legal services of members of the bar is derogatory to the self respect of the profession and would tend to lower the standards of professional character and conduct.

Such an arrangement is too apt to facilitate the solicitation of business for attorneys, and the division of a lawyer's fees with a layman. An organization of the character indicated must necessarily secure its patrons by solicitation and in so doing would be soliciting professional employment for the attorney. The attorney cannot permit others to do for him under such a cover or cloak that which would be professionally improper if done openly by himself. It is obvious that the organization would not solicit such business or furnish such professional services unless it expected to share in the lawyer's fee or to make a profit on the lawyer's professional work. The division of professional fees with those not in the profession detracts from the dignity of the profession and admits to its emoluments those who cannot lawfully perform its duties.

The foregoing answer embraces the opinion and in parts the wording and answers to similar questions given by the Committee on Professional Ethics of the New York County Lawyer's Association. (Questions respecting Proper Professional Conduct New York County Lawyer's Association, Q. and A. 36. 4711a 47 11b, 47 111a, 471Va. 74 and 98.)

QUESTION 4.

A corporation conducting a collection agency forwards an account to a lawyer for collection. May the lawyer properly divide his fee with the forwarder?

ANSWER.

No, The division of professional fees with those not in the profession detracts from the essential dignity of the practitioner and his profession; and admits to its emoluments those who cannot lawfully perform its duties. That the service given by the lawyer may not include bringing of suit or appearance in court does not change the inherent character of the situation. In performing the service the lawyer's professional skill and responsibility are engaged and any division of fees received for the service would be a division of professional fees with a layman. There is no objection to a lawyer engaging in the collection of an account but when he does so, he does so as a lawyer and is subject to the ethical standards of his profession.

The foregoing answer embraces the answers to similar questions given by the Committee on Professional Ethics of the New York County Association. (Questions Respecting Proper Professional Conduct New York County Lawyers' Association, Q. and A. 47 11a, 98.)

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attorney and Client**—Partnership.—Members of a firm of attorneys were liable for the em bezzlement of the money of a firm client by another member of the firm, without their knowledge or participation.—Model Building & Loan Ass'n. v. Reeves, N. Y., 194 N. Y. Supp. 383.

2. **Auctions and Auctioneers**—As Officers.—Under Gen. Laws 1909, c. 49, § 1 providing for the election of town auctioneers as town officers, section 15, requiring auctioneers to take the engagement of a civil officer, chapter 188, § 1, providing that the town council may appoint additional auctioneers to hold their offices until the next annual election of town officers, section 2, requiring an auctioneer to give bond for the faithful execution of the duties of his office, section 12-18, requiring an auctioneer to retain a certain duty on property sold by him for the benefit of the state and town in which he is elected or appointed, and section 22, prescribing penalties for persons assuming or exercising the office of auctioneer without being legal ly chosen, a town auctioneer is a holder of a civil office, and, under Const. art. 9. § 1, must be a qualified elector for that office.—In Re Harrington, R. I., 117 Atl. 273.

3. **Bankruptcy**—Fraud.—Where defendants elected to rescind their contracts with the bankrupt for his fraud, and to recover money paid by them, the repayment to them did not deplete the bankrupt's estate, even if such payment was not made from a deposit containing the money paid in by the defendants, since by recovering the amount of their payments from the bankrupt's general fund they released an equal amount of the funds held by him as trustee ex maleficio.—Lowell v. Brown, Mass., 280 Fed. 193.

4.——Liens.—Where the seller of a business took a chattel mortgage covering the stock and fixtures, which was fraudulent as to creditors, because withheld from record to increase the credit of the buyer, the seller is not entitled to claim a vendor's lien against the fixtures after the bankruptcy of the buyer.—In Re McCormick, Fla., 279 Fed. 916.

5.——Liens.—An agreement to give a mortgage is not a mortgage, and where such an agreement, made more than four months before a petition in bankruptcy was filed, was unexecuted at that time, the legal title to the property remained in the bankrupt, and under Bankruptcy Act, § 47a (2), as amended (Comp. St. § 9631a), giving the trustee the right of a creditor holding a lien by legal or equitable proceedings, his right is superior to that of the holder of the equitable lien.—Hayes v. Gibson, U. S. C. C. A., 279 Fed. 812.

6.——Pledge.—Bankrupt was building a road under a contract with a county containing a provision for reservation by the county of 10 per cent. of all sums due on monthly estimates until completion of the work. Needing money to meet a monthly pay roll. claimant bank, after consultation with a member of the county court and the road engineer, and ascertaining that there was then in the reserved fund about $4,700, lent bankrupt $2,200, which was used in paying employees, taking a note containing a pledge as collateral "out of account due from estimates from the county court" of the county, notice of which was given to the county court. No monthly estimate was then due. Held, that such language was intended to, and did, effect a valid pledge of the fund reserved, and that claimant was entitled to payment there from when received by bankrupt's trustee on completion of the contract.—In Re Duncan Const. Co., W. Va., 280 Fed. 205.

7.——Receiver.—Where, pending a proceeding by creditors to have five persons, alleged to be partners, adjudicated bankrupts, two of such persons, claiming to be partners under a somewhat similar name, were adjudicated bankrupts on their voluntary petition, a receiver will not be appointed in the involuntary proceeding because of the alleged danger that the petitioning creditors may be estopped if they participate in the meeting of creditors called in the voluntary proceeding.—In Re Cates, Fla., 280 Fed. 123.

8.——Sales.—Where the bankrupt was to sell goods shipped him by the claimant at a price fixed by the claimant, collect the money, and remit the price, less a commission of 12½ per cent. and these provisions were carried out there was no absolute sale to the bankrupt.—In Re Rosenbloom, Mich., 280 Fed. 139.

9.——Third Party.—Real estate and other personal property found in the actual possession of the bankrupt can be ordered delivered to the custody of the bankruptcy court in a summary proceeding; but where it has been conveyed or assigned to a third party, who is in possession thereof, though in a summary proceeding the right of possession may be determined, still jurisdiction is lost, if it is shown that a bona fide adverse claim exists.—In Re Eddy, N. Y., 279 Fed. 919.

10.——Trustees.—The trustee in bankruptcy occupies the position of a creditor holding a lien by equitable or legal proceedings on the property coming into his hands.—In Re Hallbauer, Fla., 280 Fed. 118.

11. **Banks and Banking**—Amount of Damages.—Where plaintiff deposited with defendant bank's predecessor a sum in United States money for cable transfer to a bank in Berlin to the credit of a specified person, but owing to war conditions the cable transfer was not made, and mail confirmation of the transfer was not received, plaintiff was entitled to recover the full amount of the deposit in United States money, and not merely the money value of German marks which the deposit would have purchased at their value as of the date that defendant was informed that the transfer was not made.—Chemical Nat. Bank v. Equitable Trust Co., N. Y., 194 N. Y. Supp. 177.

12.——Dishonor.—Where a depositor accepted a draft made payable at the bank, the depositor's letter to the bank requesting the bank not to pay a trade acceptance payable to named concern to be presented on specified date for stated amount, which was $2,000 less than the amount of the draft, without giving the date of the draft or the date of the acceptance thereof, held not to require the bank to suspend payment of the draft and to communicate with the depositor to ascertain whether or not it was the draft referred to in the letter, which the depositor wished the bank to dishonor.—A. Sidney Davison Coal Co. v. National Park Bank, N. Y., 194 N. Y. Supp. 220.

13. **Bills and Notes**—Directors Liability.—Under Rev. St. U. S. §§ 5200, 5239 (U. S. Comp. St. §§ 9761, 9831), as to legal amount of national bank loans and directors' liability for excessive loans, where a national bank president made a loan in excess of the legal amount, and gave his own note to the bank to reduce the apparent amount of the loan which he had made, he could not successfully contend, in suit on the note, that it was given solely to accommodate the bank, and was without

consideration, since he incurred a contingent liability when he made the excessive loan.—First Nat. Bank v. Hubbard, Mo., 240 S. W. 854.

14.——Recital.—A recital in a note that it was given covering deferred installments under condi tional sales contract for motor vehicle does not render it nonnegotiable under Uniform Negotiable Instruments Act (Rev. Code 1915, §§ 2646, 2647, 2649, 2650), and suit may properly be brought in the name of the indorsee thereof.—Continental Guaranty Corporation v. People's Bus Line, Del., 117 Atl. 275.

15. **Brokers**—Commissions.—A broker, who at the suggestion of a subsequent purchaser of land listed with him under a verbal agreement obtained a written contract authorizing the sale thereof at an agreed commission, and offered to sell it at the price stipulated by the owner, which such pur chaser refused to pay, and had no further conversation with him with reference thereto, could not recover a commission under such contract on the sale of the land at a lesser sum by other brokers; he not having obtained or furnished a purchaser ready, able, and willing to pay, at the price and on the terms set out in the contract, nor prevented from making the sale by the owner.—Thomas v. Hennes, Ind., 135 N. E. 392.

16. **Carriers of Passengers**—Rules.—An inference of a carrier's negligence may be drawn from disobedience to rules of conduct by a passenger if the carrier is negligent in enforcing such rules.—King v. Interborough Rapid Transit Co., N. Y., 135 N. E. 519.

17. **Chattel Mortgages**—Description.—Where a statute requires that a chattel mortgage shall be in writing, setting out a full description of the property, so that the same may be identified, and provides that the recordation thereof shall be notice to all parties, an alleged description reading simply "all the property owned by the mortgagor, and now located on certain premises," serves neither to describe nor identify any property, nor to give the notice intended by the statute; and hence no mortgage results therefrom.—Continental Bank & Trust Co. v. Succession of McCann, La., 92 So. 55.

18. **Commerce**—Interstate.—A workman, killed while lowering a smokestack carrying smoke from boilers used in heating water for his employer's ferryboats, engaged in interstate traffic, and in heating the ferry house used in connection therewith, was engaged in "interstate commerce," within federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).—Hiser v. Davis, N. Y., 194 N. Y. Supp. 275.

19.——Taxes.—Gen. Code Ohio, § 5728—11, providing for a tax on foreign corporations doing business in the state, based on the proportion of their authorized capital stock represented by their property and business in the state, held not unconstitutional, as imposing a burden on interstate commerce as applied to a private manufacturing corporation doing both an interstate and intrastate business, and which is taxed thereunder only in respect to the latter.—Air Way Electric Appliance Corporation v. Archer, Ohio, 279 Fed. 878.

20. **Constitutional Law**—Exclusive Privilege.—Ordinances adopted by the city under Greater New York Charter, §§ 44, 50, as amended by Laws 1901, c 466, prohibiting the use of illuminated signs in a certain section of the city, except on theaters and other places of amusement, held not void as granting an exclusive privilege to persons engaged in the amusement business in the specified locality.—Oppenheim Apparel Corporation v. Cruise, N. Y., 194 N. Y. Supp. 183.

21. **Contracts**—Subordinant Condition.—The failure, upon the part of one party, to an executory contract to perform a subordinate and incidental covenant or condition, will not excuse the other party from performing the substantial covenants and agreements provided to be performed upon his part.—Lutz v. Currence, W. Va., 112 S. E. 506.

22.——When Reasonable.—A contract of employment, whereby a laundry solicitor, collector, and deliveryman contracted not to divulge information concerning his employer's customers, or engage in the laundry business in three towns in which the employer did business during the employment, or for three years after its termination, was reasonable as to time and place.—Sherman v. Pfeffer korn, Mass., 135 N. E. 568.

23. **Corporations**—Good Will.—Where an old corporation had not made money, it was not entitled to the payment of $2,500 in the stock of a new corporation for its good will, as against creditors of the new corporation.—Joseph T. Ryerson & Son v. Peden, Ill., 135 N. E. 423.

24.——Transactions.—There is a strong presumption against the validity of transactions between corporations, where conducted entirely through the agency of officers acting at the same time for both corporations, and the burden is on those who would maintain the transactions to show their entire fairness.—Mathieson Alkali Works v. Arnold, Hoffman & Co., R. I., 280 Fed. 132.

25. **Covenants**—Nuisance.—The use of a part of a residence as a vocal studio during daylight hours held not a violation of a restrictive covenant against the erection of any building not a dwelling house or the use of the building erected for any purpose "known as nuisances in law."—Tonnelle v. Hayes, N. Y., 194 N. Y. Supp. 181.

26.——Restrictions.—The word "residence," used in a restriction affecting title to real estate, reading "upon sublots No. 1 and 32 no residence shall be erected," etc., will be construed in the abstract without reference to the singular as distinguished from the plural sense, when it appears that sublot No. 1 and sublot No. 32 are on opposite sides of the street, and that the intention of those imposing the restrictions was to encourage the development of a residence section. Nor does the language used in this respect limit the building to one residence on each sublot.—Hitz v. Flower, Ohio. 135 N. E. 450.

27. **Criminal Law**—Interstate Shipments.—A shipment of alcohol, which had been loaded into a car consigned to another state and was on the tracks of a belt line, which performed only switching services in delivering the car to the carrier which was to haul it to destination, was already in "interstate shipment," within Act. Feb. 13, 1913 (Comp. St. § 8603), relating to larceny of goods in interstate commerce.—Sharp v. United States, U. S. C. C. A., 280 Fed. 86.

28. **Death**—Time of Action.—Under the provision of Employers' Liability Act, § 6 (Comp. St. § 8662), requiring an action thereunder to be commenced "within two years from the day the cause of action accrued," a right of action for the death of an employee does not accrue until the appointment of an administrator who may maintain the action.—Kierejewski v. Great Lakes Dredge & Dock Co., N. Y., 280 Fed. 125.

29. **Evidence**—Ownership.—In an action for personal injuries, resulting from plaintiff being struck by a taxicab, evidence that plaintiff's father took the license number of the machine, and certified copies from the office of the secretary of the state, proving the application for and issuance to defendant, as owner, of that distinctive number, held to establish prima facie defendant's ownership of the taxicab.—Jones v. Detroit Taxicab & Transfer Co. (No. 31.), Mich., 188 N. W. 394.

30. **Frauds, Statute of**—Location.—A lot was sufficiently described by a receipt designating it as a certain numbered lot in a certain subdivision of a city, according to a plat filed. under Comp. Laws 1915, § 3350, relative to land platted into lots or blocks. Duncombe v. Tromble, Mich., 188 N. W. 367.

31. **Gifts**—Corporation Stock.—A certificate of stock is an incorporeal right insusceptible of being made the subject of a manual gift under Civ. Code, arts. 460, 1536, and 1539.—Succession of McGuire, La., 92 So. 40.

32.——Delivery.—Possession of notes and certificates of deposit before donor's death raises the presumption, unless the contrary is shown, that donor delivered them, but the presumption does not follow as a matter of law that the delivery was with intent to pass title.—Rothwell v. Taylor, Ill., 135 N. E. 419.

33. **Homestead**—Residence.—Under Act Feb. 28, 1889 (Laws 1889, p. 113), a widow's removal from the homestead did not operate as a forfeiture to the heirs or creditors so long as the widow and minor children resided in the state.—Kyser v. Mc Glinn, Ala., 92 So. 13.

34. **Insurance**—Insurable Interest.—A marine insurance policy, providing that the policy shall be deemed sufficient proof of interest, covers insured's interest at the time of loss, in the absence of any showing that it is a wagering contract.—Frank B. Hall & Co. v. Jefferson Ins. Co., N. Y., 279 Fed. 892.

35.——Liquidating.—Acts 1911, c. 216 (Burns' Ann. St. 1914, § 4622q), providing a special method for determining loss in a case of insurance against fire, lightning, or tornado, and, if that fails for a specified reason, authorizing action for loss with attorney fee, does not rest on a reasonable basis, but is a mere arbitrary selection of subjects for legislation, forbidden by Const. U. S. Amend. 14, and Const. Ind. art. 1, § 23 (Burns' Ann. St. 1914, §§ 39, 68).—Fidelity Phenix Fire Ins. Co. v. Purlee, Ind., 135 N. E. 385.

36.——Osteopathy.—In view of Rev. St. 1919, § 9202, providing that osteopathy is not the practice of medicine and surgery within the meaning of chapter 65, art. 1, an osteopath is not a physician or surgeon, so that a statement in an application for fraternal benefit insurance that applicant had not consulted a physician or surgeon within one year was not false because during that period he had consulted an osteopath.—Le Grand v. Security Benefit Ass'n., Mo., 240 S. W. 852.

37. **Intoxicating Liquors**—Aid.—The carrying of wood to a still for the purpose of making whisky was aiding and abetting, and hence the refusal of a charge that, if jury believed that the only act of accused in attempting to make the prohibited liquors was carrying wood to the fire, and that the same had not been used for such, the accused should be acquitted, was not error.—Barnes v. State, Ala., 92 So. 15.

38.——Possession.—An information charging defendant with "unlawful" possession of intoxicating liquors held sufficient to state an offense under National Prohibition Act, tit. 2, § 25.—United States v. Everson, Fla., 280 Fed. 126.

39. **Landlord and Tenant**—Condition Broken.—When there is a condition in a lease against assignment of the term by the lessee, without the consent of the lessor, and such consent is given to one assignment, without any restriction as to further assignments, the condition is completely waived, and the assignee may assign the term without the consent of the lessor.—Easley Coal Co. v. Brush Creek Coal Co., W. Va., 112 S. E. 512.

40.——Option.—A contract in writing, under seal, between landlord and tenant, setting out the time and terms of rental and reciting part payment of the rent, and containing therein an option to the tenant to purchase the property leased, if it be offered for sale by the landlord at any time during the lease, at the price and terms at which it may be offered to others, implies a consideration sufficient to support the option to purchase.—Casto v. Cook, W. Va., 112 S. E. 502.

41. **Limitation of Actions**—Demand.—A cause of action against company engaged in banking business, to recover the amount of a deposit which was payable on surrender of the certificate, did not accrue to the holder of the certificate until a demand for payment was made.—Emerson v. North American Transportation & Trading Co., Ill., 135 N. E. 497.

42. **Livery Stable and Garage Keepers**—Possession.—Within Lien Law, § 184, giving a lien to garage keepers for repairs and supplies for an automobile of which they have lawful possession, the possession must be with the consent or acquiescence of the owner, so that forcibly taking possession of an automobile as agent for the holder of a conditional sale contract does not entitle the garage keeper to retain possession to enforce a lien for repairs and supplies furnished to the conditional buyer.—Rapp v. Mabbett Motor Car Co., N. Y., 194 N. Y. Supp. 200.

43. **Mandamus**—Corporations.—Where the duties of a state corporate entity are defined by statute, and not by the principles of the common law, and an alternative writ of mandamus commands such corporate entity to perform an act not authorized by the statute from which the powers and duties of the corporate entity are derived, the alternative writ should be quashed on appropriate procedure.—Hardee v. State, Fla., 91 So. 909.

44. **Master and Servant**—Course of Employment.—An employee going from his work to his lodging house on the employer's premises, where he had the privilege of sleeping as a part of the compensation for his work, was performing services arising out of and incidental to his employment in the course of his employer's trade, business, and occupation, within Employers' Liability Act, § 1, par. 2.—Prevost v. Gheens Realty Co., La., 92 So. 38.

45.——Indifference.—The act of an inexperienced employee offbearing lumber in a sawmill, in turning to the left instead of the right and thereby coming in contact with the saw and losing his hand held not to amount to a deliberate and reckless indifference to danger, which would bar recovery under the Workmen's Compensation Law, § 129.—Shockley v. King, Del., 117 Atl. 280.

46. **Municipal Corporations**—Boundaries.—The word "block," as used in New York City Charter §992, providing that "the owners of land * * * within the lines of any street * * * and comprising all the land within said lines in an entire block in extent," may convey the same to the city on terms therein stated, held to include within its meaning the distance between an established street and the harbor front.—United States v. Benedict, U. S. C. C. A., 280 Fed. 76.

47.——Negligence.—Where cross-ties were placed across a bad place in a dirt sidewalk simply as stepping-stones, it was not negligence for plaintiff to use the sidewalk knowing that they were there.—Lemoine v. City of Alexandria, La., 92 So. 58.

48.——Negligence.—An instruction that it was the duty of a truck driver to use ordinary care to keep a vigilant watch ahead for persons and vehicles in the street and in the path of truck, merely placed the common-law duty of ordinary care on defendant, and does not require of him a higher degree of care than the law requires, especially since the Supreme Court has held that to keep a vigilant watch is no more than the common-law duty.—Greer v. Springfield Creamery Co., Mo., 240 S. W. 833.

49.——Notice.—Rev. St. 1919, § 7955, declaring that no action may be maintained against a city for personal injuries unless notice thereof is given within 60 days after injury, does not create a cause of action, and, the action being created by common law, the condition as to service of notice is not a part of plaintiff's cause, and neither the notice nor the conditions need be pleaded in the petition.—Beane v. City of St. Joseph, Mo., 240 S. W. 840.

50.——Ordinance.—Plats and profiles inclosed with a copy of a paving ordinance when filed in the county court inside of a rubber band were substantially attached to the ordinance by means of the band.—City of Carlinville v. Anderson, Ill., 135 N. E. 407.

51.——Right to Contract.—Where a city had no authority to make an irrevocable contract fixing street car fares, it could not enforce, as a condition precedent to the right to continue to use its streets, an ordinance fixing such fares, after the fare so fixed had become confiscatory.—City of New Orleans v. O'Keefe, U. S. C. C. A., 280 Fed. 92.

52. **Negligence**—Agency.—The negligence of the driver of a wagon furnished by the township trustees to transport children to school, under statute requiring trustees to furnish a wagon, resulting in the death of a child, could not be imputed to the parent, who, while having the right to avail himself of the agency, had no right to control or regulate it.—Union Traction Co. v. Gaunt, Ind., 135 N. E. 486.

53.——Invitee.—Where plaintiff, with defendant's knowledge and sanction, assisted the janitress of defendant's apartment house in return for board

and room, the plaintiff, in performing such duties, was not a trespasser, but was an invitee, toward whom the defendant owed the duty of exercising ordinary care.

Clarke, P. J., dissenting.—Marino v. Farrell, N. Y., 194 N. Y. Supp. 356.

54.——Res Ipsa Loquitur.—Where the complaint in an action for wrongful death alleges that decedent was a passenger on a train of defendant railroad company and was killed in a collision between trains the rule of res ipsa loquitur is not excluded by the fact that the complaint also alleges specific acts of negligence.—Rosenzweig v. Hines, N. Y., 280 Fed. 246.

55. **Principal and Agent**—Torts.—A principal is civilly liable for his agent's torts, including fraud and deceit, when acting in the actual or apparent scope of his employment, though he exceeds his authority or disobeys the principal's express instructions.—Greenough v. United States Life Ins. Co., N. Y., 117 Atl. 332.

56. **Removal of Causes**—Telephone.—A complaint seeking to enjoin the collection of increased telepnone rates, which alleged the defendant was acting in fraudulent disregard of its contract, and maliciously intending to injure and damage plaintiff, in consequence, of which he had already been injured in the sum of $2,999, and would suffer great and irreparable injury, shows that the jurisdictional amount of $3,000 is in controversy, where, in addition to the punitive damages thus sought, which may be considered in determining the jurisdictional amount, it appeared that the telephone company had collected $2.60 in excess of the contract rates, and especially where the petition for removal alleged the amount in controversy exceeded $3,000, and that allegation was not denied by plaintiff.—Miller v. Southern Bell Telephone & Telegraph Co., U. S. C. C. A., 279 Fed. 806.

57. **Sales**—Acceptance.—Where a buyer ordered overcoats of a specified kind, to be delivered by a certain date, which did not comply with specifications and were delivered late, and returned some, but, after refusing to accept, kept the rest to try to sell them, and finally wrote he would retain them after altering some of the coats, the buyer is liable for the price, having waived strict performance of the contract.—Symons v. Greenwood, Atkinson, Armstrong Co., Mich., 188 N. W. 366.

58.——Counterclaim.—In an action for the price of coal sold, in which defendant counterclaimed for damages, a demurrer to defendant's evidence was properly overruled where it showed without contradiction that the coal was bought for domestic purposes and was unfit therefor, was of poor quality, was short in weight, and that the buyer ordered shipment stopped, and sold some of the coal at a loss.—Stephan Coal Co. v. Lloyd, Mo., 240 S. W. 1092.

59.——Delivery.—Where a seller based its refusal to deliver the balance of cloth contracted for on the ground that it had completed the contract, it could not claim, when sued by the buyer, that there was a delay in previous payments, as it could not assume that the buyer would fail to meet future payments.—Trevas & Schack v. Napel Mills Co., Mass., 135 N. E. 477.

60. **Street Railroads**—Last Chance.—In an action for damages from a collision between an automobile and a trolley at a place on the track obviously intended for the use of the trolley company only, it was not error to instruct that there was no duty on the trolley company to anticipate an automobile at this place, but, if the motorman actually saw the automobile, it was his duty to stop the trolley and prevent the injury, if possible.—Baker v. Des Moines City Ry. Co., Iowa, 188 N. W. 828.

61. **Taxation**—Conditional Sales.—Under Act June 2, 1915 (P. L. 730; Pa. St. 1920, § 20363) as to taxation of foreign corporations, a foreign corporation which has within the state a number of cash registers which it has delivered to residents of the state under contracts which are leases with option to buy is liable to be taxed upon the value of such cash registers, though the real object of the transaction was a sale of the machines, as the situs of the property is in Pennsylvania, and represents an investment therein of the capital of the company doing business in the state.—Commonwealth v. National Cash Register Co., Pa., 117 Atl. 439.

62. **Time**—Sunday.—Under General Construction Law, § 20, as amended by Laws 1910, c. 347, § 1, making a uniform beginning for all periods of time, and providing that, in computing any specified period of time from specified event, the day on which the event happens is the day from which reckoning is made, a Sunday, if it be the last day of the period within which the act is required to be done, is not excluded, unless the period is specified as a number of days so that where the cause of action accrued August 1, 1917, a suit instituted on August 2, 1920, was barred by the three-year limitation, though August 1, 1920, was Sunday.—Russell v. Kniffin, N. Y., 194 N. Y. Supp. 792.

63. **War**—Contracts.—Government contracts on May 11, 1917, took precedence of civilian contracts, and in so far as they prevented performance constituted a good defense for the delay or cancellation of them, in view of National Defense Act (U. S. Comp. St. §§ 3115f-3115h).—Mawhinney v. Millbrook Woolen Mills, Inc., N. Y., 194 N. Y. Supp. 780

64. **Wills**—Child.—An illegitimate child whose paternity has been established in the manner provided by Code, § 3385, is a 'child" within section 3270, invalidating the disposition of more than one-fourth of a testator's estate to an eleemosynary corporation, if a spouse, 'child," or parent survives; "child" meaning one who would be entitled to inherit under section 3378 if decedent had died intestate.—Hastings v. Rathbone, Iowa, 188 N. W. 960.

65.——Class.——Under will directing executors to divide residue into as many parts as there were children surviving testator of a named person, and directing trustee to hold these separate trusts for the children for their respective lives, pay them the income quarterly, and the principal as each child reaches majority, a child of the named person born three years after the testator's death was not entitled to participate, as the bequest was to specified persons, and not to a class.—In Re Gillespie's Will, In Re Central Union Trust Co. of New York et al., N. Y., 135 N. E. 824.

66.——Posthumous Birth.—Under Act April 8, 1833 (P. L. 251), § 15, making the birth of a "child" operate to effect a pro tanto revocation of the will, the posthumous birth of a grandchild after the death of her father, the only child of the testator, does not operate to revoke the will executed prior to the birth of such child, but subsequent to the death of the child's father, in which no provision is made for after-born issue; such statute having reference to the children of testator, and not to grandchildren.—In Re Alburger's Estate, Pa., 117 Atl. 450.

67.——Undue Influence.—In a will contest, in which the testator's wife was charged with undue influence, evidence that over two years after the will was made, and a few days before testator's death, the wife pinched him and shook him for the purpose of rousing him to sign instruments, and that she guided his hand, held competent as showing her indifference to his welfare and control over him, and her disposition to exercise such influence when it suited her purpose; it not having been excluded, as too remote.—Neill v. Brackett, Mass., 135 N. E. 690.

68. **Workmen's Compensation Act**—Award.—In a proceeding under the Workmen's Compensation Act by an employee against his employer for an award, where the employer participated in hearings before an arbitrator and a commission, without objection, and stipulated that it was operating under the act, the question of the constitutionality of the act was waived.—Carterville & Big Muddy Coal Co. v. Industrial Commission et al., Ill., 135 N. E., 726.